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No. 03-184

Supreme Court, U.S.
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In The

Supreme Court of the United States

CLAUDE M. BALLARD AND MARY B. BALLARD,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Respondent skirts over the fact that the opinion below endorsed a procedure whereby *one* judge (who is an at-will employee) conducts a trial, views the witnesses, hears the arguments of counsel, makes credibility determinations, and then writes a report with factual findings and legal conclusions, while *other* judges, who are to review the trial judge's work in appellate-style, "confer" with the trial judge off the record in order to change the trial judge's findings, with no public knowledge of *what* the trial judge's original findings were or why they were changed.

The government has never offered a remotely plausible or legitimate rationale for keeping STJs' reports secret. Its sole argument about the meaning of a Tax Court Rule relies on a Circuit split that was created by the decision below and that has further deepened since that decision issued. Due process requires, at a bare minimum, that the fact-finding of the only judge present to observe the witnesses be done *on the record*, so that if any subsequent modification is made, appellate courts can tell whether it was done properly.

The Tax Court's procedure is without precedent or analogue in all of American law. Not only has it affected the many hundreds of taxpayers who have faced trials before Special Trial Judges (STJs) over the past two decades, it will continue to affect thousands who will face such trials in the future. Due to the uncontradicted record evidence here showing that the Tax Court reversed the original STJ report,[1] this case presents a unique opportunity for this Court to address a due process problem that is present, but unlitigated, in many other cases.

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[1] See Affidavit of Randall Dick, Pet. App. at 308a-10a (describing conversation in which two Tax Court judges revealed that the original report in this case was secretly reversed).

A. Respondent Misinterprets Petitioners' Due Process Claims

Let it be clear: Petitioners' case does not hinge on any *per se* objection to the use of Special Trial Judges, or on any objection to the Tax Court's practice of reviewing the reports of STJs. Nor does Petitioners' case stand or fall on any claim that Rule 183 requires clear error review (as opposed to *some* standard of review above *de novo*).

Instead, Petitioners' due process claim is quite simple: When a fact-finder issues a set of findings that are treated as presumptively binding, whether it be a special master's report or a jury's verdict or an STJ's report, those initial fact-findings must be made public. If those initial fact-findings are changed, the change must also occur on the record, so that appellate courts can consider the full record.

Respondent consistently addresses straw-man arguments, rather than coming to grips with Petitioners' claims. Thus, for example, Respondent argues that due process does not require that the final decision be made by someone who "personally observed the testimony in the case." Br. in Opp. 9. Even if correct, this is irrelevant. Petitioners have not claimed that regular judges of the Tax Court are allowed no role in the decision-making process. Rather, the question is whether the Tax Court can leave the parties and the Article III courts in the dark when an otherwise binding credibility determination made by a judge who *was present* has been set aside or modified by his absent employer. *Cf. United States v. Raddatz*, 447 U.S. 667, 681 n.7 (1980); Pet. for Cert. 17-18.

Respondent similarly misses the mark in suggesting that there is "no requirement that Tax Court judges operate in a manner *precisely identical* to Article III courts." Br. in Opp. 12 (emphasis added). Petitioners are not demanding identical behavior. Petitioners are merely asking that the Tax Court observe a fundamental principle of American law: When a fact-finder comes to a presumptively binding conclusion of what the facts are, the parties

have a right to know what that conclusion was, and, if changed, why it was changed.

Respondent repeatedly quotes the Eleventh Circuit's observation that "there is nothing unusual about judges conferring with one another about cases assigned to them."[2] Petitioners do not claim that Tax Court judges and STJs should never be allowed to converse. The point is that if Tax Court judges attempt to persuade the STJ to "revise[] his views of the [facts in the] case," which is the government's own theory of what happened here, Br. in Opp. 13 n.3, the STJ's original report should be made public so that the parties and reviewing courts know what happened.[3]

Finally, Respondent contends that regular judges are "not to defer to, or apply a 'clearly erroneous' standard in reviewing, the proposed findings of special trial judges. . . ." Br. in Opp. 11. This contention is contrary to the Tax Court's own rules, as Petitioners demonstrate in Section B. But even if Rule 183 did not require "clear error" review, it is inconceivable that *no deference* would be due to STJs' decisions. In this case, just as in hundreds of others, the STJ alone conducted the lengthy trial, viewed the dozens

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[2] Br. in Opp. 6, 8, 13 n.3, 15 (quoting *Ballard*, Pet. App. 9a). Respondent provides no citation for this point other than the very decision on review here.

[3] Moreover, while judges *who are peers* (such as the members of this Court or appeals court judges on three-member panels) commonly confer on the outcome of a case, the situation is different where, as here, one judge conducts the trial and makes the *original* findings of fact, while the other judge or judges sit in what amounts to a *reviewing* capacity. See *infra* at 6. Fact-finding is a task uniquely suited to personal observation. While no one doubts the propriety of judges' conferring *generally*, Respondent is unable to cite any case suggesting that anyone – judge or otherwise – who is absent from a trial adds anything but mischief to the *initial* fact-finding process. In no other American court system do *reviewing* judges meet with *trial* judges in order to modify or reverse the outcome with no public record of what the trial judge originally thought. Yet that is exactly what the Tax Court claims the right to do.

of witnesses, and heard the arguments of counsel. By necessity, therefore, the role of regular Tax Court judges is to perform *some sort of review* of the STJ's report. When legitimate questions arise as to whether that review function was performed properly, no one can know what happened if the Tax Court, unlike every other court in the land, insists on keeping the original fact-findings secret.

B. As Respondent's Brief in Opposition Makes Clear, This Case Involves a Persistent and Deepening Conflict Among the Circuits

As Respondent concedes, the decision below that a change in the STJ's original opinion is legitimate when wrought through the Tax Court judge and the STJ "conferring with one another," Pet. App. 9a, turns on the legal conclusion that "[r]egular [Tax Court] judges are . . . not to defer to, or apply a 'clearly erroneous' standard in reviewing, the proposed findings of special trial judges." Br. in Opp. 11. Indeed, that is the only basis upon which Respondent defends the decision below.

The decision of the Eleventh Circuit here flatly conflicts with *Stone v. Commissioner*, 865 F.2d 342 (CADC 1989), in which the D.C. Circuit held that the phrases "due regard" and "presumed to be correct" in Tax Court Rule 183 (then labeled 182) rule required clear error review as to the STJ's findings. On that basis, the D.C. Circuit reversed a Tax Court decision because it had not given the deference required by the Rule to the STJ's report.[4] *Stone* represents the settled rule under which the Tax Court bar has operated since the time it was decided until today. See, *e.g.*, 35 AM. JUR. 2D FED. TAX ENFORCEMENT § 905 (2002) ("The Tax Court is required to review a special trial judge's

[4] The D.C. Circuit continues to adhere to its view of the meaning of Rule 183. See, *e.g.*, *Landry v. Federal Deposit Ins. Corp.*, 204 F.3d 1125, 1133 (CADC 2000).

factual findings according to the clearly erroneous standard, and cannot overturn a special trial judge's ruling on the basis that the Tax Court finds the testimony credited by the trial judge to be unbelievable."); 20A FEDERAL PROCEDURE, L. ED., Internal Revenue § 48:1274 (2000) (same)

1. The decision below squarely conflicts with *Stone* and, as Respondent's Brief in Opposition makes clear, Br. in Opp. 11, the split is deepening. Since the decision below, the Seventh Circuit has explicitly agreed with the court below that the Tax Court Rules do not "prescribe any particular level of deference due the STJ's report," *Kanter v. Commissioner*, 337 F.3d 833, 841 (CA7 2003), and that the Tax Court Judges need not review the STJ's original Reports for "clear error."

Respondent argues that this split is somehow obviated by a 1984 amendment to the Tax Court rules. See Br. in Opp. 11 n.2. But *none* of the language on which the *Stone* Court relied *has ever been changed*.[5] There is therefore no ground to claim that *Stone* has been undermined.

Curiously, Respondent suggests that the very elimination of the publication of the STJ's Report – the only change in the rule wrought by the amendment upon which Respondent would rely – means that *Stone* is no longer good law. "By eliminating [the furnishing to the parties of copies of the STJ's Report], the Tax Court Rules now make it clear that review by a regular judge of a special trial judge's report is not an appellate review. . . . " Br. in Opp. 11 n.2.

[5] The *Stone* court relied *entirely* on the following sentence from the Tax Court's rule: "Due regard shall be given to the circumstance that the commissioner had the opportunity to evaluate the credibility of witnesses; and the findings of fact recommended by the commissioner shall be presumed to be correct." See *Stone*, 865 F.2d at 345-47. This sentence in Rule 183 remains *unchanged to this day*.

Obviously, the change in the Rules does no such thing. The Rule still requires that when STJs conduct trials, other Tax Court judges must, after the fact, give their findings "due regard" and a presumption of correctness. This Court has clearly stated that the use of a "presumption" with respect to a "finding" imposes a "standard of review" making "clear" that the party giving the presumption is a "reviewing body." See *Concrete Pipe & Prods. of California, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 621-25 & n.15 (1993). Suspending the publication of decisions under review does not change a reviewing court's function any more than keeping circuit court decisions secret would change the appellate nature of this Court's work.[6]

2. Respondent's "no deference" argument flies in the face of the plain language of Rule 183.[7] Phrases such as "due regard" and "presumed to be correct" plainly suggest clear error review.

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[6] Nothing in the Fifth Circuit's decision in *Freytag v. Commissioner*, 904 F. 2d 1011, 1015 n.8 (CA5 1990), *aff'd on other grounds*, 501 U.S. 868 (1991) – the only case on which Respondent relies – supports its position. That case did not involve the Tax Court Judge *failing* to give deference to the findings of the Special Trial Judge. Rather, the objection was that the Chief Judge had adopted a Special Trial Judge's Report as the opinion of the Tax Court on the very same day that the Report was filed by the STJ, thereby giving *too much* deference to the STJ. See *id.* at 1015. In rejecting that claim, the Fifth Circuit did not remotely suggest that *no* deference was now due the STJ's report, nor did it say, as Respondent misleadingly suggests, that "review by a regular judge of a special trial judge's report is not an appellate review but is an exercise of the regular trial judge's original factfinding authority." Br. in Opp. 11 n.2. Indeed, the *Freytag* court specifically noted that "Tax Court Rule 183(c) indicates that the special trial judge's recommended findings of fact shall be presumed correct." 904 F. 2d at 1015 n.8.

[7] *Cf. Pavelic & LeFlore v. Marvel Entertainment Group, Div. of Cadence Indus. Corp.*, 493 U.S. 120, 123 (1989) ("We give the Federal Rules of Civil Procedure their plain meaning. . . ."); *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750, n.9 (1980) ("The Federal Rules should be given their plain meaning.").

"Due regard" is universally used in the context of requiring clear error review. See, *e.g.*, FED. R. CIV. PRO. 52(a) ("Findings of facts . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."); RULES OF THE U.S. COURT OF FEDERAL CLAIMS 52(a) (same); FED. R. BANKR. PRO. 8013 (same). Respondent does not explain how "due regard" could translate to "no deference" here. Br. in Opp. 11.

This Court and lower courts (including the Tax Court) have consistently held that there is a "*presumption of correctness*" as to the IRS's determinations of tax deficiencies. This phrase is always used to mean that the taxpayer bears the burden of proving that the IRS erred.[8] Respondent does not explain how the same phrase – "presumption of correctness" – could mean both that courts *must* defer to the IRS's determinations *and* that the Tax Court is "*not to defer to*" STJs. Br. in Opp. 11.[9]

3. The decision below thus implicates a real and deepening split among the Circuits about the level of deference due to an STJ's Report and findings. For this reason alone, certiorari should be granted.

C. Respondent's Other Arguments Miss the Mark

Respondent argues that 26 U.S.C. § 7482 has been satisfied here, because an STJ's report is not the "decision" of the Tax Court, and only the final "decision" of the Tax

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[8] See, *e.g.*, *United States v. Janis*, 428 U.S. 433, 441 (1976); *Forte v. Commissioner*, 61 T.C.M. (CCH) 1754 (1991) ("Next, petitioner contends that the position taken by respondent in the notice of deficiency was clearly erroneous, thereby rebutting respondent's presumption of correctness. . . .").

[9] Nor does the Tax Court itself believe that no deference is due the STJ's Report. Indeed, it went out of its way to assure the parties that due regard and a presumption of correctness were given the STJ's Report. See Br. in Opp. 2a.

Court must be reviewed under Section 7482. Br. in Opp. 13. This argument misreads Section 7482, which provides that review must be conducted "*in the same manner and to the same extent*" as decisions of civil bench trials in district courts. Where a district court has employed a magistrate or special master, the reviewing appellate court will *always* be provided with that original set of fact-findings as part of the record. Pet. for Cert. 15-16. In order for Article III courts to review Tax Court decisions "*in the same manner and to the same extent*" as they would review district court decisions, they must have access to STJs' Reports.

Respondent claims that tax fraud trials are "public rights" cases. Br. in Opp. 12. Even so, the Constitution *always* requires effective Article III review. See, *e.g.*, Pet. for Cert. 23 (collecting numerous citations); *Crowell v. Benson*, 285 U.S. 22, 54 (1932) (noting that the statutory scheme "preserv[ed] [the courts'] complete authority to insure the proper application of the law."). Due process continues to apply to adjudications in the Tax Court and other Article I tribunals, and defendants accused of tax fraud have a due process right to see the original fact-finding report that exonerated them.

There have been no cases in the past 19 years in which the Tax Court indicated on the record that it had modified so much as a single word of an STJ's report. Br. in Opp. 14. Respondent points out, however, from 1976 to 1984, when STJ reports *were* provided to the parties, there were only twenty cases (out of 680) in which the Tax Court modified the STJ's report, and "only one" in which the STJ was reversed. (In fact, there were at least *two* such reversals prior to 1984, one of which was cited by Respondent earlier in its brief.)[10]

[10] The reversal that Respondent fails to cite here took place in *Rosenbaum v. Commissioner*, 45 T.C.M. (CCH) 825 (1983). This was the

(Continued on following page)

Thus, Respondent concedes that while the Tax Court formerly indicated on occasion that it had rejected or modified a STJ's report, the Tax Court has not made *any* such public acknowledgment for nearly two decades now. There are only three possible explanations: First, STJs and all other Tax Court judges always agree on every fact and legal conclusion, with no exception to be found. This is impossible. See *Kanter*, 337 F.3d at 876 (Cudahy, J., concurring in part and dissenting in part). Second, the Tax Court does nothing but rubber-stamp the opinions of STJs. But this contradicts the government's own claim that STJs are not allowed to "decide" cases and that the Tax Court gives *no* deference to STJs. Br. in Opp. at 11. Third, the Tax Court *does*, in fact, alter or reverse STJs' decisions, but without ever creating any public record. In fact, that is exactly what occurred in this case, as the undisputed evidence shows.[11]

Respondent points to what it claims is an analogous Tax Court procedure: when a case has been tried by a regular judge and then reviewed by the full Tax Court, the original opinion of the regular judge need not be made public. Br. in Opp. 10. Respondent then cites two cases (both of which predate *Raddatz*, 447 U.S. at 681) as

decision that the D.C. Circuit in turn reversed in *Stone*, on the grounds that the Tax Court had failed to give due deference to the STJ. Respondent cites *Rosenbaum* and *Stone* earlier, Br. in Opp. 11 n.2, but omits *Rosenbaum* on page 14.

[11] Notwithstanding the government's fine-toothed parsing of a Tax Court order, Br. in Opp. 13 n.3, the Commissioner's counsel conceded at the Eleventh Circuit's oral argument that there is no evidence whatsoever to dispute the sworn affidavit of Randall Dick, Pet. App. at 308a-10a, which describes the conversation in which *two Tax Court judges told him that Judge Couvillion's original result had been changed by the reviewing judge*. The government essentially concedes this point when it speculates that the STJ changed his mind between writing his original report and the issuance of the final Tax Court decision. Br. in Opp. 13 n.3. Judge Cudahy noted a similar concession by the government at the Seventh Circuit oral argument. See *Kanter*, 337 F.3d at 876 (Cudahy, J., concurring and dissenting in part).

holding that due process is not violated by this procedure. See Br. in Opp. 10, citing *Estate of Varian v. Commissioner*, 396 F.2d 753 (CA9 1968); *Heim v. Commissioner*, 251 F.2d 44 (CA8 1958). These cases are inapposite; they were decided not under Rule 183, but under 26 U.S.C. § 7460(b). "Review" under these two provisions is not the same thing. First, the relationship between a regular Tax Court judge and the full Tax Court is fundamentally different than the relationship between an STJ and the Tax Court. In the first instance, all of the judges are *peers*, while in the second instance, the STJ is an inferior, at-will employee whose work is supposed to be reviewed for clear error. See *Stone, supra*. Second, in each of these cases, the original trial judge was part of the full Tax Court that reviewed the case. Third, he or she was given the opportunity to dissent, and to have that dissent *fully incorporated* into the released opinion.[12]

* * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[12] See *Varian*, 396 F.3d at 755 n.1 ("In this case, in fact, the one judge who constituted the division which heard the case dissented from the final decision of the full court on all issues that are relevant here."); *Heim*, 251 F.2d at 47 ("It appears from the dissenting opinions of Judge Opper and Judge Fisher that Judge Opper was the trial judge who heard the evidence.").

In this case, by contrast, there is no dissent by Judge Couvillion. Rather, the final opinion purports to be an adoption of his findings, even though two Tax Court judges acknowledged, in undisputed record evidence (see footnote 11, *supra*), that the conclusions and findings are not actually Couvillion's, and are certainly not his own *original* credibility determinations.